

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE PAINTED WORD, LLC,

Plaintiff,

v.

HALEY'S COTTAGE; CYNTHIA SULLIVAN
and TIMOTHY SULLIVAN, her husband, and
the marital community thereof,

Defendants.

CASE NO. C04-2229C

ORDER

I. INTRODUCTION

This matter has come before the Court on Plaintiff's motion for a default judgment (Dkt. No. 7) and on Defendants' motion to vacate the clerk's entry of default (Dkt. No. 14). Having carefully considered the papers filed by the parties in support of and in opposition to the motions, the Court hereby DENIES Plaintiff's motion for default judgment and GRANTS Defendants' motion to vacate the clerk's entry of default.

II. BACKGROUND

Plaintiff is a developer, producer, marketer, and distributor of "unique painted word signs." (Compl. ¶ 7.) Defendant Haley's Cottage, owned and operated by Defendant Cynthia Sullivan, is a retail

1 store specializing in gifts and home decor, and had formerly carried Plaintiff's painted word signs in its
2 retail outlets. Plaintiff alleges that Cynthia Sullivan began to produce her own painted word signs for sale
3 at Haley's Cottage, and that these signs were identical or nearly identical to Plaintiff's signs.

4 Plaintiff filed its complaint on October 28, 2004. Service of summons and a copy of the
5 complaint was effected on Defendant Haley's Cottage on November 11, 2004. Cynthia Sullivan
6 responded with a letter to Plaintiff's counsel sometime in December 2004. She also claims that in
7 February 2005, after receiving a proposed joint status report, Ms. Sullivan re-sent the letter to Plaintiff's
8 counsel, followed up by a voicemail asking Plaintiff's counsel whether the letter was a sufficient response.
9 She received no reply.

10 Plaintiff filed its motion for entry of default on May 20, 2005. The docket reflects no appearance
11 on Defendants' part until May 24, 2005 (Dkt. No. 13). Defendants now move to vacate the Clerk's entry
12 of default against Defendants.

13 III. ANALYSIS

14 Federal Rule of Civil Procedure 55(c) provides that a court may set aside an entry of default for
15 good cause shown. In the Ninth Circuit, a showing of good cause contains three elements: "(1) whether
16 the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense;
17 and (3) whether reopening the default judgment would prejudice the plaintiff." *TCI Group Life Ins. Plan*
18 *v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). *See also Franchise Holding II, LLC v. Huntington*
19 *Rests. Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) (explaining that a showing of good cause must
20 include all three factors).

21 However, prior to addressing the Rule 55(c) analysis, the Court must determine whether the
22 Clerk's entry of default was proper. If Defendants may be found to have "appeared" prior to entry of
23 default, the default is void *ab initio*. *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*,
24 840 F.2d 685, 689 (9th Cir. 1988). The Ninth Circuit has recognized that principle that although
25 "[n]ormally, an appearance in an action 'involves some presentation or submission to the court,'" because

1 “judgments by default are disfavored, ‘a court will usually try to find that there has been an appearance by
2 defendant.’” *Id.* The *Direct Mail* court cited a case in which a defendant had been found to have
3 appeared where “the parties had exchanged a number of letters and had a series of meetings, and neither
4 party had any doubt the suit would be contested if they did not reach a satisfactory settlement.” *Id.*
5 (citing *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689 (D.C. Cir. 1970).)
6 The *Direct Mail* court also noted that the Ninth Circuit had previously declined to find an appearance
7 under *H.F. Livermore* where a party had sent only one letter partially responsive to the complaint and
8 where there had been no settlement negotiations. *Id.* (citing *Wilson v. Moore & Assocs., Inc.*, 564 F.2d
9 366 (9th Cir. 1977).) Ultimately, the *Direct Mail* court concluded that the critical question is whether the
10 defendant’s actions demonstrate a clear purpose to defend the suit. *Id.*

11 In the case at bar, Plaintiff alleges, and Defendants do not contest, that Defendants discharged
12 their attorneys shortly before the commencement of this litigation and following active settlement
13 negotiations and notice that this action was about to be commenced. The parties also agree that Ms.
14 Sullivan responded to the complaint in the form of a letter. However, under the standard followed in
15 *Direct Mail*, the Court must find that this litigation-related activity on Ms. Sullivan’s part is insufficient to
16 constitute an “appearance” voiding the entry of default. Like the case at bar, *Direct Mail* considered a
17 situation in which settlement negotiations had only been conducted prior to and on the day that summons
18 was served. The *Direct Mail* court found that from the day after process was served, there was no
19 indication that the defendant intended to defend the lawsuit. Ms. Sullivan’s letters notwithstanding, *see*
20 *Wilson*, 564 F.2d 366, the Court concludes that Defendants did not appear in this action and that the
21 Clerk’s entry of default was proper.

22 The Court now turns to the Rule 55(c) analysis. Defendants argue that the conduct leading to the
23 entry of default should not be considered culpable conduct. Ms. Sullivan claims that she thought her
24 letters to Plaintiff’s counsel constituted a sufficient response to Plaintiff’s complaint and that she thought
25 the matter was going to be dropped. The Ninth Circuit’s definition of culpable conduct requires

1 affirmatively bad behavior rather than mere neglectfulness. *TCI Group*, 244 F.3d at 698 (citing cases
2 dealing with “conduct which hindered judicial proceedings” and conduct for which the excuse was weak,
3 but was “not the result of deviousness or willfulness”). In light of this standard, and without more of a
4 showing that Defendants’ failure to appear was the result of willfully bad behavior, the Court finds that
5 Defendants are not culpable in a manner precluding Rule 55(c) relief.

6 The second element inquires into whether Defendants have a meritorious defense to the
7 allegations. Defendants’s briefing on this motion and their motion to dismiss Plaintiff’s copyright claim
8 satisfy the Court that Defendants have a potentially meritorious defense sufficient to justify Rule 55(c)
9 relief. Defendants allege, and Plaintiff fails to substantively contest, that Plaintiff’s copyright infringement
10 claims may be facially invalid for lack of subject matter jurisdiction. *See Corbis Corp. v. Amazon.com,*
11 *Inc.*, 351 F. Supp. 2d 1090, 1111 (W.D. Wash. 2004) (explaining that a district court does not have
12 jurisdiction over an infringement claim until the Copyright Office grants the registration). In addition,
13 Defendants raise other potentially meritorious claims about the sufficiency of Plaintiff’s Lanham Act
14 claims. For these reasons, the Court finds that Defendants have made a successful showing of the second
15 element.

16 Finally, the last element inquires whether vacation of the entry of default will cause undue
17 prejudice. In the context of setting aside a judgment, governed by the same standard as the setting aside
18 of entry of default, *see TCI Group*, 244 F.3d at 696, “to be prejudicial, the setting aside of a judgment
19 must result in greater harm than simply delaying resolution of the case. Rather, the standard is whether
20 plaintiff’s ability to pursue his claim will be hindered,” *id.* (citation omitted). Here, Plaintiff objects that
21 “[e]very day that Defendant is allowed to continue to infringe on Plaintiff’s trade dress and designs causes
22 serious and irreparable harm to Plaintiffs, their business, and to the goodwill associated with Plaintiff’s
23 trade dress and designs.” (Pl.’s Resp. at 4.) This description of the “prejudice” suffered does not include
24 any hardship other than the hardship Plaintiff would have suffered had default not been entered. For this
25 reason, the Court finds that Plaintiff has failed to show that its ability to pursue its claim will be adversely

1 affected by setting aside the entry of default. Accordingly, Plaintiff has failed to show that it will suffer
2 undue prejudice.

3 For these reasons, the Court finds that Defendants have made a showing of good cause sufficient
4 to justify the setting aside of the entry of default pursuant to Rule 55(c).

5 IV. CONCLUSION

6 In accordance with the foregoing, the Court hereby GRANTS Defendants' motion to vacate the
7 Clerk's entry of default and DENIES Plaintiff's motion for default judgment.

8
9 SO ORDERED this 14th day of June, 2005.

10
11 
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25